Google Inc. et al v. Egger et al Doc. 333 Att. 6

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS,
TINA M. FOSTER, GITANJALI S. GUTIERREZ,
SEEMA AHMAD, MARIA LAHOOD,
RACHEL MEEROPOL,

Plaintiffs,

v.

GEORGE W. BUSH,
President of the United States;
NATIONAL SECURITY AGENCY,
LTG Keith B. Alexander, Director;
DEFENSE INTELLIGENCE AGENCY,
LTG Michael D. Maples, Director;
CENTRAL INTELLIGENCE AGENCY,
Michael V. Hayden, Director;
DEPARTMENT OF HOMELAND SECURITY,
Michael Chertoff, Secretary;
FEDERAL BUREAU OF INVESTIGATION,
Robert S. Mueller III, Director;
JOHN D. NEGROPONTE,
Director of National Intelligence,

Defendants.

Case No. 06-cv-313

Judge Gerard E. Lynch
Magistrate Judge Kevin N. Fox

SUPPLEMENTAL AFFIRMATION OF WILLIAM GOODMAN

I, William Goodman, an attorney admitted to practice before this Court, and the Courts of the State of New York, hereby affirm under penalty of perjury as follows:

1. I am the Legal Director of the Center for Constitutional Rights ("CCR"), a nonprofit public interest law firm in New York. I, along with Shayana Kadidal, a staff attorney at CCR, David Cole, a CCR board member, and Michael Avery and Ashlee Albies of the National Lawyers Guild are counsel for the Plaintiffs in this action.

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2. I am a member of the bars of the State of New York and the United States District Court for the Southern District of New York.

3. I submitted an earlier affirmation in this case, dated March 9, 2006, in support of Plaintiffs' motion for summary judgment of March 9, 2006. In that affirmation I described how the Center for Constitutional Rights litigated, with others, the Supreme Court case challenging the indefinite detention of foreign nationals at Guantánamo Bay Naval Station, *see Rasul v. Bush,* 542 U.S. 466 (2004). CCR continues to coordinate the representation of approximately 500 Guantánamo Bay detainees in conjunction with some 500 *pro bono* attorneys across the country as described in that affirmation. I submit this supplemental affirmation to go into somewhat greater detail without disclosing information concerning identities of the attorneys or clients in question.

4. Our attorneys represent a number of foreign nationals detained at Guantanamo and considered "enemy combatants" by the United States government. We also represent their next friends in the habeas litigation on behalf of the detainees. These next friends are primarily family members of the detainees residing in foreign countries. Other persons residing in foreign countries with whom we need to communicate with in the course of the litigation of these cases include foreign witnesses, experts, and human rights advocates. I will collectively refer to these individuals as "litigation participants" in the text that follows.

5. Communicating with these family members and other litigation participants concerning sensitive matters via electronic means of communication is often not feasible and may be ethically problematic in light of the existence of the NSA Program and the fact that the open-ended criteria announced by government officials for targets of the Program (*see* Summary Judgment Motion at 6-7) would frequently include them.

6. It is particularly difficult to communicate with such a litigation participant for the first time via electronic means of communication. The first sentence out of the attorney's mouth in such a conversation often must be a disclaimer warning that the conversation may be subject to surveillance by the United States government pursuant to the Program. It is difficult to imagine a worse thing to have to say at the onset of a relationship with a client, witness, or other person with whom one wishes to work closely. Obviously it is difficult if not impossible to develop a relationship of trust with an individual whose first impression of you is formed by such a warning. The effect is inevitably to make the CCR staffer appear to be in some fashion an agent of the United States government, or to make our organization appear suspect due to the fact that communications with us are subject to government surveillance. This is especially problematic given cultural sensibilities and attitudes towards Americans in the Middle East.

7. The burdens of traveling to foreign countries to visit litigation participants in person in lieu of the more convenient means of electronic communication (phone and email) are obvious and have been spelled out in my previous affirmation. However, foreign travel is not an option in some cases, for there are some litigation participants we are absolutely unable to visit in person. Many of these litigation participants live in nations that CCR attorneys are unable to acquire visas to visit. (For instance, no category of "tourist visa" or the equivalent exists for certain Gulf States.) Sometimes it is possible for the persons CCR needs to communicate with to travel to neighboring countries to meet us face-to-face, but not always. At least one very important litigation participant in a current CCR case is currently unable to travel from home due to illness, and we are unable to visit that person in their home country because of the unavailability of general visas that would allow CCR attorneys to visit that country.

Communication with this litigation participant regarding sensitive litigation matters via phone or email is impossible because the individual is clearly within the NSA Program's target class.

8. CCR has attempted to use private courier services to communicate with litigation participants. However, such use of mailed letters may present other security issues, and does not permit either the ready back-and-forth counseling inherent in any attorney-client relationship or the sort of probing inquiry essential to any investigative enterprise. Other practical difficulties have presented themselves. For instance, many litigation participants in the Guantanamo litigation live in very isolated places in less-developed nations. While they can often be reached by some form of courier, we have had difficulty in at least one case in finding a means to let them send messages back to us.

9. The concerns described above also apply to other litigation which is in development by CCR attorneys.

10. Since the public disclosure of the existence of the NSA Program, the CCR attorneys litigating *Turkmen v. Ashcroft*, No. 02-CV-2307 (E.D.N.Y.) have successfully moved the Court for an order compelling the government's trial team and likely witnesses to disclose whether they have had access to surveillance of attorney-client communications in that case. *See* 2006 U.S. Dist. LEXIS 40675 (E.D.N.Y. May 30, 2006). Many of the petitioners represented by CCR in the Guantanamo litigation have similar concerns about surveillance of their privileged communications with persons located overseas, including clients (including next friends of the detainees, such as their family members), witnesses, experts and human rights lawyers and co-counsel. However, proceedings in the relevant habeas cases in the district courts in Washington, D.C. were stayed pending resolution of the question of retroactive effect of jurisdictional provisions in the Detainee Treatment Act of 2005. Now that those questions have been largely

resolved by the Supreme Court's decision yesterday in *Hamdan v. Rumsfeld*, 2006 WL 1764763 (June 29, 2006), habeas counsel at CCR will likely begin to make similar efforts to move for disclosure of whether any such surveillance has taken place. I expect that the difficult struggle to win such disclosure in *Turkmen* will be repeated here, and that a large amount of resources in terms of attorney time and effort will be required to obtain a similarly satisfactory result.

11. At my request, a leading legal ethics expert, Stephen Gillers of New York University Law School, has provided an affirmation detailing the professional responsibilities of CCR's attorneys and legal staff in relation to international electronic communications in the wake of the NSA Program. Professor Gillers' opinion confirms my previous statement that "[a]s a matter of professional ethics in our role as attorneys, CCR is obligated to take reasonable and appropriate measures to reduce the risk of disclosure of client confidences and work product, since we have been apprised that a program of unlawful electronic surveillance by the government exists and that the program is targeted at a category of persons that includes—from the government's perspective—some of our clients." Goodman Aff. of Mar. 9, 2006, at ¶ 15.

12. In short, we continue to divert staff time and organizational resources away from core mission tasks in order to respond to the NSA Program. This diversion of resources hurts our organization by reducing the number of cases we can bring, and undermines our ability to litigate our existing cases in the most effective manner.

13. I am unable to go into more detail regarding many of the above matters without any such filings being made subject to protective measures to safeguard attorney-client and work product privileges.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

William Goodman, Esq.

Dated: June 30, 2006